IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 2987 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL RANCHHODBHAI BABUBHAI - Applicant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

MR JM PANCHAL AND MR KJ PANCHAL for petitioner(s) : 1,
MR HM Prachchhak APP for respondent (s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 28/10/2005

ORAL JUDGMENT

1. By instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure ('the Code' for short), the petitioner (A-1 for short) calls in question legality of the judgment and order dated 13.12.1995 rendered in

Criminal Appeal No.11 of 1995 by the learned Additional Sessions Judge, Mehsana upholding his conviction and sentence for the offence punishable under Section 306 and Section 498-A of the Indian Penal Code ('IPC' for short) recorded vide judgment and order dated 26.5.1995 in Sessions Case No.2 of 1993 by the learned Extra Assistant Sessions Judge, Mehsana.

2. The prosecution version as reflected from the FIR and unfolded during the trial is as follows:

2.1. The marriage of deceased Manjula with A-1 had taken place five years prior to the incident. During the wedlock she gave birth to a male child named Bhupendra. As per the prosecution case, for initial period of one and half years she was given good treatment but because of the joint family she was subjected to mental and physical harassment at the hands of accused Nos.2 and 3 (who are not before this Court as they have been

acquitted by the learned Extra Assistant Sessions Judge). At the instance of A-2 and A-3, she was beaten by A-1. The deceased therefore used to go to her parental house and her parents used to persuade her and to send her to her in-law's place.

2.2. It was also further prosecution case that prior to almost 3 ½ years of the incident, deceased Manjula was beaten and was driven out of her matrimonial house and therefore she had preferred application under Section 125 of the Code to get maintenance from A-1 before the learned JMFC, Viramgam. However, because of the intervention of caste persons a compromise was arrived at and the matter was amicably settled and the application for maintenance was withdrawn and deceased Manjula was thereafter taken to her matrimonial home. 2 to 3 months thereafter again the deceased came to her parental home and complained that she was being meted out with same

cruelty. Lastly on the eve of Randhan-Chhath she came to her parental home and told that she would not go to her matrimonial home again.

2.3. Baldevbhai Maganbai Patel, the complainant thereafter met one caste leader i.e., Laljibhai who told the complainant not to send Manjula till he himself so tells or sends his own man or sends a chit. It was the prosecution case that a day prior to the incident, A-1 came with the chit of Laljibhai and on the next day i.e., on the day of the incident, as A-1 brought a chit from Laljibhai, the deceased was sent with A-1 to her in-law's house.

2.4. It was alleged that on the same day at about 11 P.M. the complainant received information that deceased Manjula committed suicide by consuming poison and therefore the complainant and other relatives went to the house of the accused and as the accused persons did not behave properly,

they came back. Thereafter, as police jeep came they sat in the jeep and came at Kalol where they saw the dead body of deceased and thereafter the complainant gave the complaint at Kalol Taluka Police station.

2.5. In pursuance of the registration of the FIR, investigation was carried out which was subsequently handed over by the concerned police officer to the PSI of Kadi Police station. It was further case of the prosecution that 2 to 3 days after the incident, the statements of the complainant and his relatives were recorded by the police but in fact those statements were taken down by the police at the instance of one caste leader, namely, Kanjibhai, who had informed the police that such statements are to be written down as per the talk with one Laljibhai. It was the case of the prosecution that even though the complainant and his relatives did not give any statement to police, the same were being taken

down. It was further case of the prosecution that the police did not take any action, after lodging of the complainant and caste leaders like Kanjibhai and Laljibhai induced the complainant, his brother, his parents and neighbours and took them to Kadi and got their affidavit sworn in and they were not permitted to read the contents of the same. It was further case of the persecution that the complainant thereafter made an application to Jyoti Sangh authorities and it was on the basis of this subsequent application, the investigation was carried out and their statements were recorded by the police.

2.6. During the course of investigation, further statement of the complainant as well as witnesses were recorded and since offence was divulged against the accused they came to be charge sheeted for the offence under section 306 and section 498-A of IPC in the court of learned JMFC, Kadi. Since the offence was exclusively

triable by the court of sessions, the learned JMFC, Kadi committed the case to the court of Sessions, Mehsana.

2.7. On committal, the learned Extra Assistant Sessions Judge, Mehsana framed charge against the accused who pleaded innocence and claimed to be tried and therefore they were put on trial by the learned Extra Assistant Sessions Judge, Mehsana in Sessions Case No.2 of 1993.

2.8. To prove the charge levelled against the accused, the prosecution examined as many as eight witnesses and relied upon several documents, including original complaint filed by Baldevbhai Maganbhai Patel, Panchnama, post mortem report, etc.

2.9. At the conclusion of the trial, the learned Extra Assistant Sessions Judge, Mehsana held that the prosecution has failed to prove the charge

against accused Nos.2 and 3 who are father and mother of A-1 whereas prosecution has proved the charge against A-1. He therefore recorded finding of not guilty qua accused Nos.2 and 3 and recorded the finding of guilt qua A-1 and resultantly acquitted accused Nos.2 and 3 whereas convicted A-1 for the offences under Section 306 and Section 498-A of IPC and accordingly A-1 was sentenced to suffer RI for 5 years and to pay fine of Rs.2000/- and i.d. further R.I. for 30 days for the offence under Section 306 of IPC and RI for 3 years and fine of Rs.1,000/- and in default of payment of fine, further RI for 15 days for the offence under Section 498-A of IPC.

2.10. Aggrieved by the judgment and order of conviction and sentence imposed on A-1 by the learned Extra Assistant Sessions Judge, he has filed appeal before the Court of Sessions, Mehsana being Criminal Appeal No.11 of 1995 which was heard by learned Additional Sessions Judge,

Mehsana who vide judgment and order dated 13.12.1995 dismissed the appeal filed by A-1 and confirmed the order of conviction and sentence recorded against A-1 by the learned Extra Assistant Sessions Judge, Mehsana, which has given rise to the present revision application at the instance of A-1, who is the petitioner before this Court.

3. Mr. JM Panchal, learned advocate with Mr. KJ Panchal, learned advocate of A-1, has contended that the judgment and order passed by both the courts below are contrary to law and express provisions of statute and against the evidence on record. According to him, both the courts below have materially erred in appreciating the evidence in its true sense and proper perspective which has resulted into miscarriage of justice. He has contended that the courts below have materially erred in relying upon the evidence of highly interested witnesses when there was no

corroboration of independent witnesses and when there were basic infirmities in their evidence. According to him, there were lot of material contradictions, omissions, improvements in the evidence of highly interested witnesses but both the courts below have failed to appreciate the same. It is also pointed out by him that immediately after the incident the police thoroughly investigated into the offence. The police recorded statements of all the nearest relatives of the deceased, family members of the complainant and also neighbours and independent caste persons. All the nearest relatives including family members of the complainant, neighbours, caste persons have specifically and unequivocally and clearly stated that there was no cruelty whatsoever meted out to deceased Manjula by any of the accused persons. They have specifically stated before the police that deceased Manjula wanted to stay separately with her husband and she did not like the children of

A-1 by his previous marriage and therefore she was disgusted. According to him, statement of all the material witnesses recorded by the police immediately after the incident did not disclose any offence whatsoever. However, after considerable long time and after due consultations and deliberations, the complainant and his family members again made serious allegations against the accused that deceased Manjula was subjected to cruelty. They therefore with the help of social workers of Jyoti Sangh requested the investigating officer to record their statement again and thereafter their statements were recorded again wherein they have stated that deceased was subjected to mental and physical cruelty at the hands of accused and accused had abetted the deceased to commit suicide. It is also highlighted by him that accused Nos.2 and 3 have been acquitted though their case is not distinguishable from the case of A-1 and therefore A-1 is also required to be

acquitted. It is also asserted by him that the courts below ought to have appreciated the evidence of P.W.8, Balabhai Rajpara, Ex.45, who carried out the investigation and in his examination in chief he has stated that investigation carried out by him first in time was not sufficient even to submit charge-sheet. Lastly it is also emphasised by him that when the evidence is not examined and appreciated in its true, legal and proper perspective the revisional court can examine the merits of the case for the purpose of satisfying itself as to the legality, correctness and propriety of any finding or order passed by the lower courts and in a revision application filed under Section 397 read with Section 401 of the Code this Court can definitely interfere with the concurrent finding of fact recorded by both the courts below by allowing the revision application and thereby setting aside the order passed by both the courts below. He therefore urged that the impugned

judgment and order of convicting and sentencing A-1 passed by learned Extra Assistant Sessions Judge, Mehsana which is affirmed in appeal by the learned Additional Sessions Judge, Mehsana deserves to be quashed and set aside by allowing this revision application and thereby acquitting A-1 of the offence with which he was charged. He therefore urged to allow this revision application.

4. Mr. HM Prachchhak, learned APP for respondent – State of Gujarat has supported the judgment and order passed by both the courts below throughout as accordingly to him no illegality or infirmity has been committed by both the courts below in convicting and sentencing A-1. It is also asserted by him that the concurrent finding of fact recorded by both the courts below normally cannot be interfered and set aside in a revision application filed under section 397 read with Section 401 of the Code as the scope of revisonal

court is very much limited and confined only to correcting material and manifest error committed by both the courts below and in the instant case, there is no material or manifest error committed by the courts below in recording conviction and sentence against A-1 and therefore he urged to dismiss the revision application.

5. This court has considered the submissions advanced by Mr. JM Panchal, learned advocate with Mr. KJ Panchal, learned advocate for A-1 and Mr. HM Prachchhak, learned APP for respondent _ State of Gujarat, perused both the impugned judgment and order as well as the set of evidence supplied by Mr. Panchal during the course of his submission and the decisions of the Supreme Court cited at the Bar.

6. A perusal of both the impugned judgment and order and the set of evidence, following aspects which are incapable of being disputed even by

the prosecution and which cannot be overlooked or neglected by this court are seen:

(i) Marriage of deceased Manjula with A-1 was arranged against her wishes. She was a lady having independent nature and that before marrying with A-1, Manjula was married with another person and had obtained divorce at her own wish. A-1 was having two children by his previous marriage when deceased married with A-1. This fact was not informed to the deceased by her parents and therefore when she came to know about this fact she did not like A-1.

(ii) Deceased Manjula was all the while insisting A-1 to stay separately with her leaving his parents, children and deaf and dumb sister and with a view to bringing pressure on him, she had filed the maintenance application against A-1.

(iii) As the desire of Manjula to stay

separately with A-1 could not be fulfilled and as the marriage was performed against her wishes, in utter frustration she committed suicide by consuming poison. There is no evidence to the effect that prior to her consuming poison there was any instigation or abetment on the part of the accused to drive her to commit suicide.

(iv) There is also non-examination of independent and important witnesses by the prosecution and only interested and related witnesses are examined.

(v) On scanning the evidence of witnesses examined by the prosecution, there is a lot of inconsistencies, contradictions, omissions and legal infirmities and therefore their evidence do not inspire confidence.

(vi) There are two sets of evidence which emerge from the prosecution evidence. Firstly

immediately after the incidence when the statements of relatives were recorded, they specifically and clearly stated that deceased Manjula was not subjected to cruelty by the accused and subsequently all the relatives after a considerable period, came with the version involving the accused. It is cardinal principle of criminal jurisprudence that when there are two sets of evidence, the one which supports the defence of the accused should normally be accepted.

(vii) So far as the letters written by the deceased on which heavy reliance is placed by both the courts for convicting A-1 are concerned, they also raise serious doubt. Firstly the complainant has admitted in his cross examination that they were produced after about 3 months of filing of complaint. Secondly these letters were not referred to in the complaint. Thirdly if the letters are seen there are many

scorings, corrections and erasures. Fourthly after receiving the letters, no opinion of any expert was obtained by the prosecution that they were written in the handwriting of the deceased. Fifthly if these letters are perused they do not refer to any cruelty being meted out to her.

(viii) So far as the allegation of filing of affidavits of relatives of the complainant by deception and coercion is concerned, it does not inspire any confidence. Firstly it was not the case of the prosecution but it was merely an allegation of the close relatives only which was not proved. Secondly no question was put to investigating officer in this regard whether he had collected the alleged affidavits or whether any investigation was carried out by him in this connection. Thirdly these affidavits were not on record and no investigation was carried out by the police. Fourthly there was no evidence of any notary or of any advocate through whom they were

prepared or filed. The allegation advanced by the persecution witnesses in their evidence for giving cruelty differs and changes. The material contradictions, omissions and inconsistencies are not given due weightage by lower courts. That there is no allegation levelled by witnesses of dowry, or of cash, or of any articles. As per the allegation of the witnesses the dispute was because of residing in joint family which could probabilise the case of defence.

7. In view of the aforesaid aspects which have been high-lighted in the foregoing paragraphs which are not capable of being disputed by the prosecution, the question that arises for consideration of this court is whether the learned trial Judge has appreciated the evidence in its true spirit and perspective and without appreciating the evidence he has recorded the finding of guilt against A-1?

8. The allegations are general in nature. There is no evidence to the effect that which type of mental and physical cruelty was meted out to deceased Manjula. On the contrary, she was frequently leaving the house of A-1. It has also come in evidence that deceased Manjula was divorced from her previous husband. Same way A-1 is having two children from his previous wife. When deceased Manjula was married, this fact was not brought to her notice by her parents. Therefore she was very much frustrated as she did not like A-1 and therefore she was insisting to stay separately with A-1 leaving not only his parents and his deaf and dumb sister but two children as well. There is no evidence to the effect that when the accused abetted deceased Manjula to commit suicide.

9. In the case of Sanju alias Sanjay Singh Sengar v. State of Madhya Pradesh, 2002 AIR SCW 2035 (SC) the Supreme Court has held that accused

telling deceased 'to go and die' that itself would not constitute ingredient of 'instigation'. Presence of mens rea is necessary concomitant of instigation. The fact that deceased committed suicide after two days of quarrel during which the said words were uttered by accused would show that suicide was not direct result of quarrel and, therefore, the Supreme Court has held that that the chargesheet framed under section 306 of IPC against the accused was liable to be quashed as ingredients of abetment were totally absent.

10. In the case of Ramesh Kumar v. State of Chhattisgarh, (2001) 9 SCC 618 (SC) the Supreme Court has held that there must be a reasonable certainty to incite the consequence. Merely because accused is found guilty under Section 498-A he should not necessarily be held to be guilty under section 306 of IPC on the basis of the same evidence.

11. Applying the principals laid down by the Supreme court in the above referred to judgments to the facts of the present case, there is no direct evidence as to what type of physical and mental cruelty was meted out by A-1 to deceased Manjula as well as what abetment or instigation was given by the accused to the deceased to commit suicide. There is also no evidence to the effect that when the last quarrel took place between the deceased and A-1. Therefore, according to this court, when the allegation by the prosecution is general in nature against all the accused and when two other accused having been held not guilty for the offence of which they are charged, how on the same evidence A-1 can be held guilty and therefore according to this court the impugned judgment and order convicting and sentencing A-1 does not stand to scrutiny of this court.

12. No doubt, it is true that concurrent finding

of fact recorded by both the courts below normally cannot be interfered with in the absence of any special circumstance or same are perverse in any manner in a revision petition filed under Section 397 read with Section 401 of the Code. However, it can be interfered with in a special case in which either by misreading of some evidence or failure to consider some vital point a grave failure of justice has resulted or where the concurrent findings of lower courts are unfounded and unreasonable. Concurrent findings recorded by the trial and appellate courts cannot be stamped as infallible because they are concurrent nor can the conviction recorded by the two courts be maintained if it is legally unfounded and unsustainable. When the courts below instead of dealing with the intrinsic merits of the evidence of the witnesses, have acted perversely by summarily disposing of the case, permitting the manifest errors and glaring infirmities appearing in the case, the court can

interfere. Even concurrent finding of fact can be interfered with if they are perverse or are not based on legal evidence in exercise of the power conferred under Section 397 read with Section 401 of the Code.

13. In view of the foregoing discussion and the settled principles of law enunciated by the supreme Court in Sanju's case (supra) and Ramesh Kumar's case (supra), presence of mens rea is necessary concomitant for instigation for the offence of abetment to commit suicide. In the instance case, that mens rea is absent and there is no clinching evidence to the effect that deceased Manjula was subjected to mental and physical cruelty at the hands of A-1 and in view of the aspects which have been highlighted in the foregoing paras of this judgment which are incapable of being disputed even by the prosecution and all witnesses examined by the prosecution are interested witnesses whose

evidence is bristled with lot of contradictions, omissions and improvements as there are two sets of their statements recorded during the course of investigation as admitted by investigating officer and when accused Nos.2 and 3 have been acquitted of the same offence on the same set of evidence on record, there is no reason to convict A-1 for the offence for which he was charged on the same set of evidence. Therefore, the impugned judgment and order rendered by the learned Extra Assistant Sessions Judge convicting and sentencing A-1 for the offences under section 306 and 498-A of IPC which which is affirmed by the learned Additional Sessions Judge in appeal deserve to be quashed and set aside by allowing this criminal revision application.

14. For the foregoing reasons, the petition succeeds and accordingly it is allowed the result of which is that the impugned judgment and order dated 26.5.1995 rendered in Sessions Case No.2 of

1993 by the learned Extra Assistant Sessions Judge, Mehsana convicting A-1 for the offences punishable under section 306 and section 498-A of IPC and sentencing him which is affirmed in Criminal Appeal No.11 of 1995 by the learned Additional Sessions Judge, Mehsana vide judgment and order dated 13.12.1995 is hereby quashed and set aside and accordingly A-1 is acquitted of the offences with which he was charged.

Fine, if paid, by A-1 in the trial court shall be refunded to him by the concerned court, on due verification.

A-1 is on bail and therefore his bail bonds shall stand cancelled and surety is discharged.

Rule is made absolute accordingly.

(A.M. Kapadia, J.)

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